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In the
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

KEVIN LAMONT HICKS,
Respondent.

BRIEF OF THE STATES OF ALABAMA, ALASKA, DELAWARE, FLORIDA, HAWAII, INDIANA, MISSISSIPPI, MISSOURI, OHIO, OKLAHOMA, OREGON, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND THE COMMONWEALTH OF PUERTO RICO IN SUPPORT OF PETITIONER,

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QUESTION PRESENTED

1. May a criminal defendant escape conviction by invoking the overbreadth doctrine even though (i) his own offense did not involve any expressive conduct, and (ii) his conduct was not proscribed by that portion of the government policy he challenges as overbroad?

2. In this context, does the Constitution recognize a distinction between actions taken by a governmental unit as landlord and actions taken by a governmental unit as sovereign?

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INTEREST OF AMICUS CURIAE

Attorneys general – and thus the chief law enforcement officers – of their respective states and commonwealths, submit this brief on behalf of their states or commonwealths as amici curiae. Under varying schemes, the Attorneys General are called upon to enforce laws that protect the welfare and safety of their states' citizens. They are also responsible for defending laws, policies, and actions against constitutional attacks. The Virginia Supreme Court has construed the First Amendment in a way that implicates both of these missions.

The Virginia Supreme Court's expansive interpretation of the First Amendment overbreadth doctrine threatens to make susceptible to overbreadth challenges public safety and other laws that were heretofore outside the doctrine's reach. Schools, libraries, and courthouses have strict restrictions on unauthorized persons entering all or portions of their property. Trespass laws and polices are often the first law enforcement tools that keep potentially dangerous persons from entering, and thus protect adults and children who reside on, work on, attend school on, or visit government property. The Virginia Supreme Court interpreted the overbreadth doctrine in a way that could lead to declarations that many trespass policies are invalid and thereby make government-owned property less safe for residents and for the public.

The amici seek to defend the continued ability of government officials to protect public safety through the enforcement of criminal laws, including laws against trespassing on government property.

SUMMARY OF ARGUMENT

The overbreadth doctrine as interpreted by this Court is narrow. It allows a court to invalidate a law or policy if its mere existence, as opposed to its application, deters or "chills" potential speakers, regardless of whether the statute has been unconstitutionally applied to the defendant or litigant. Moreover, even when there is a chilling effect of a law or policy directed toward conduct, it can be invalidated only when the interest in preventing chilling of protected speech outweighs the legitimate sweep of that law.

Though narrow, the doctrine is an extraordinary departure from the traditional rules of standing. It allows a person to challenge a statute based on its potential application to persons not before the court. Therefore, it is only applied sparingly and as a last resort.

Here, the Virginia Supreme Court should not have invoked the overbreadth doctrine to invalidate the policies of the Housing Authority[1] barring from a housing development non-residents, non-employees, and persons who "cannot demonstrate a legitimate business or social purpose for being on the premises."[2]

The policy at issue is part of the enforcement mechanism for an ordinary criminal law – a trespass statute – that only incidentally affects speech. And the person invoking the overbreadth doctrine was not even engaging in First Amendment expressive activity. When the main focus of the law or policy is not the restriction of speech, but the protection of the public, and the person subject to the charge at issue is not engaging in expressive activity, the likelihood of chilling from the existence of the law is too remote to justify its invalidation. Here, the Virginia Supreme Court invoked the overbreadth doctrine with neither a finding nor evidence that the Housing Authority policy had a chilling effect on speech.

Even if there had been some evidence that the existence of the Housing Authority policy deterred someone from engaging in protected speech, the interest in preventing the chilling would be outweighed by the government interest in public safety. Trespass laws serve a critical function. When public housing developments [illegible] open-air drug markets, when courthouses are threatened with bioterrorism attacks, and when schools are subjected to gunfire, trespass laws are often the first

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[1] The Richmond Redevelopment and Housing Authority is referred to herein as the Housing Authority.

[2] *Virginia v. Hicks*, 563 S.E.2d 674, 676 (Va. 2002).

line of defense. The essential safety role those laws play should not be subordinated to a mere conjecture that they may be applied to prevent someone from engaging in protected speech.

The holding of the Virginia Supreme Court ignores the safety interest of those using government property. The court's holding does not deprive those who live on private property of the benefit of trespass laws. But it takes that protection away from the poor who live in public housing – and not because the trespass laws and policies have affected speech, but merely because they might. It also takes trespass protection away from others who use the government's real estate, whether they be library patrons, school and college students, or even visitors to this Court.

This Court should reiterate the narrow scope of the overbreadth doctrine, bringing its focus back to its traditional and appropriate limits so as to protect persons on government property.

ARGUMENT

I. As an exception to the general rules of standing, the overbreadth doctrine should be applied sparingly.

Attorneys general and other government officials frequently hear the cry that a statute, regulation, or policy is "overbroad." The Virginia Supreme Court, losing sight of the core principles of the overbreadth doctrine as set forth by this Court, has expanded the doctrine to unprecedented lengths.

The overbreadth doctrine is an exception to the traditional rule governing constitutional adjudication, *i.e.*, that a person to whom a statute may constitutionally be applied cannot challenge the statute on the ground that it could be unconsti-

tutionally applied to others.[3] That traditional rule exists because "courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws."[4] Nevertheless, this Court has concluded that "the First Amendment needs breathing space," and established overbreadth as an exception to the general rule. That exception, under which litigants are permitted to challenge a statute on its face even though their own rights of free expression have not been violated, is based on a "judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[5] This potential for self-censorship is sometimes referred to as the "chilling" effect of such a law.[6]

Holding that a law is facially overbroad in violation of the First Amendment brings two consequences. First, if the challenge occurs in a criminal case, the defendant goes free.[7] Second, any enforcement of that law is forbidden, at least until the law is changed or is given a limiting construction that "remove[s] the seeming threat or deterrence to constitutionally

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[3] *New York v. Ferber*, 458 U.S. 747, 767 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). The doctrine is occasionally applied, as here. to policies rather than a statute, regulation, or ordinance. For simplicity, we refer generically to "laws."

[4] *Broadrick*, 413 U.S. at 610-11.

[5] *Id.* at 612.

[6] *Ferber*, 458 U.S. at 772, n.27; *Broadrick*, 413 U.S. at 618.

[7] *Gooding v. Wilson*, 405 U.S. 518 (1972).

protected expression."[8] Because these consequences are so severe, this Court calls the application of the overbreadth doctrine "strong medicine" that should be "employed by the Court sparingly and only as a last resort."[9] The overbreadth doctrine is to be applied only when "facial invalidation of a statute is truly warranted" and "carefully tied to the circumstances."[10]

The Virginia Supreme Court failed to explain why the extraordinary remedy of invalidating a policy, particularly one primarily directed to protecting public safety, was "truly warranted." The Virginia court's blurry vision obscures the principles underlying the overbreadth doctrine, letting courts stray and jeopardizing safety in public housing, schools, and courthouses.

II. The overbreadth doctrine should apply only to laws that are directed to expressive activities and that are capable of chilling protected speech, and to defendants who engage in expressive activities.

This Court has warned that the overbreadth doctrine is "strong medicine."[11] But the way the doctrine was applied by the Virginia Supreme Court, it was more than strong medicine. It was an amputation.

The Virginia Supreme Court did not invalidate that

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[8] *Broadrick*, 413 U.S. at 613.

[9] *Id.* at 613.

[10] *Ferber*, 458 U.S. at 769.

[11] *Broadrick*, 413 U.S. at 613.

state's trespass statute.[12] Instead, it invalidated the Housing Authority's trespass *policy* as being facially overbroad. The Virginia court called the Housing Authority policy partially written and partially unwritten. The written portion makes the trespass statute applicable to any non-resident or non-employee or any other person who "cannot demonstrate a legitimate business or social purpose for being on the premises."[13] The court found the "unwritten" portion in the testimony of a manager of the Housing Authority regarding hypothetical situations.[14] As the Commonwealth of Virginia points out in its brief on the merits, that testimony may be more accurately described as reflecting an "unwritten addendum" to a written policy. Moreover, the Virginia court resorted to use of an oxymoron when it stated that an "unwritten" policy is "facially" overbroad.[15]

The Virginia Supreme Court's ruling is disturbing. It in effect repeals Virginia's trespass law, but only in selected areas: Housing Authority properties and government property to which trespass policies of similar specificity apply. Those trespass laws and policies provide obvious public safety benefits. They afford privacy and security to persons who live, work, or visit the areas that they cover. These benefits remain in place for most Virginia residents. But persons who live in public housing, and presumably for anyone on government property covered by an unauthorized-persons trespass policy

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[12] The trespass law under which defendant Hicks was convicted is Va. Code § 18.2-119.

[13] *Hicks*, 563 S.E.2d at 676.

[14] 563 S.E.2d at 680.

[15] *Id.*

similar to that of the Housing Authority, have lost the protection of the Virginia trespass law.

Respondent obtained that result even though the Virginia court did not jump all the hurdles prerequisite to an overbreadth finding. A court considering an overbreadth challenge must determine whether the party making the challenge has standing to do so as well as whether substantively the doctrine should apply in the particular factual situation. The question on which this Court granted certiorari deals with the standing issue, *i.e.*, can defendant Hicks bring an overbreadth challenge here? The Commonwealth of Virginia has briefed that issue thoroughly and its analysis will not be repeated here. But in addition to the important concerns regarding standing, amici are also concerned with the deficiencies in the Virginia court's substantive analysis. By applying the overbreadth doctrine without a finding or evidence that the contested trespass policy has a chilling effect, or even an explanation of why the interest in public safety is outweighed by the interest in deterring a chilling effect, the Virginia court has created a very troubling precedent – one with significant adverse implications.

Courts and commentators have noted that the overbreadth doctrine should not be applied in a fashion that threatens public safety, *i.e.*, that it should not be applied to ordinary criminal laws, and to trespass laws in particular. For instance, this Court in *Broadrick v. Oklahoma* recognized a distinction between applying the overbreadth doctrine to laws that primarily regulate speech and applying it to laws that do so only indirectly or incidentally: "[O]verbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct."[16] And in *New York v. Ferber*, this Court stated: "[T]he

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[16] *Broadrick*, 413 U.S. at 613.

Court's practice when confronted with ordinary criminal law that are sought to be applied against protected conduct is not to invalidate the law in toto, but rather to reverse the particular conviction."[17] This Court further observed in *Broadrick* that when it had overturned breach-of-peace convictions in the past, it did so on as-applied grounds, and considered references in those opinions to facial overbreadth to be dicta.[18]

Additionally, this Court has stated that the function of the overbreadth doctrine "attenuates" as the behavior moves from "pure speech" toward conduct (even if expressive) that "falls within the scope of otherwise valid criminal laws that reflect legitimate state interests."[19] Even if the conduct-directed law does deter speech, "there comes a point where that effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face."[20] When conduct, and not merely speech is involved, the overbreadth must be both real and substantial, when compared to the statute's "plainly legitimate sweep."[21] Thus, while chilling is a prerequisite to an overbreadth invalidation, it is not sufficient. The nature and degree of the chilling must be weighed against the legitimate sweep of the law.

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[17] 458 U.S. at 773.

[18] *Broadrick*, 413 U.S. at 614-15, *distinguishing Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Garner v. Louisiana*, 368 U.S. 157 (1961); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Teamsters Union v. Vogt, Inc.*, 354 U.S. 284 (1957).

[19] *Broadrick*, 413 U.S. at 615.

[20] *Id.*

[21] *Id.*; *Hill v. Colorado*, 530 U.S. 703, 731-32 (2000).

Commentators have endorsed these principles expressly as to trespass laws, even in advocating an expansion of the overbreadth doctrine, because "courts should hesitate to find substantial overbreadth" to a statute "that aims to promote state interests unrelated to the content of expression and that infringes First Amendment interests only incidentally."[22] That is because

> when the government has not targeted expressive activity, courts cannot reasonably require a regulation to achieve the degree of precision that is warranted when a law centrally implicates speech. Only a small likelihood will typically exist that the statute reflects a covert effort to discriminate on the basis of content. Moreover, the government's valid interest in being able to enforce the statute will frequently be important.[23]

An often-cited Harvard Law Review Note presents a similar analysis. The author observes that overbreadth scrutiny applies when the "primary conduct ... at issue must to a substantial extent be the kind of expressive and associational behavior which at least has a colorable claim to the protection of the [first] amendment."[24]

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[22] Richard H. Fallon, *Making Sense of Overbreadth*, 100 YALE L.J. 853, 896 (1991). *See also id.* at 908 (advocating greater use of overbreadth doctrine).

[23] *Id.* at 897.

[24] Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 860 (1970).

The Virginia Supreme Court took the overbreadth doctrine to a new level when it applied that doctrine to an ordinary criminal law, and to conduct that was not expressive conduct protected by the First Amendment.[25] The likelihood of a chilling effect in such circumstances is remote. Here, the Virginia court invalidated the Housing Authority policy without concluding that the policy deterred or was likely to deter anyone from engaging in protected expressive activity. There was no evidence that anyone interested in engaging in protected expressive activity even knew of the Housing Authority policy. An unknown policy does not deter conduct.

Using the overbreadth doctrine as anything other than "a last resort"[26] to attack laws that really do deter speech threatens the fair and proper use of the criminal law. Courts considering the doctrine must recognize that it is not applied broadly; here, as in many other instances where a criminal defendant wants to invoke overbreadth to avoid prosecution, we are only at "a point where [the chilling] effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face."[27] It must be an extraordinary circumstance where a defendant whose actions have absolutely nothing to do with speech is able to avoid prosecution because a statute might, at some other time

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[25] In the instant case, defendant Hicks merely claimed to be delivering diapers to his son when he was charged with a trespass violation. *Hicks*, 563 S.E.2d at 677, 684. Hicks had previously been convicted of damaging property at the Housing Authority. *Hicks v. Virginia*, 548 S.E.2d 249, 252 (Va. App. banc 2001), *aff'd in part and vacated in part*, 563 S.E.2d 674 (Va. 2002).

[26] *Broadrick*, 413 U.S. at 613.

[27] *Id.* at 613, 615.

in some other, so far entirely hypothetical circumstance, be invoked to inhibit speech.

III. By establishing a low standard for invalidation of criminal trespass laws, the Virginia Supreme Court's ruling seriously threatens public safety.

Even in cases in which some chilling exists, courts must balance the chilling effect of the law or policy against its "plainly legitimate sweep."[28] Here, the public safety interests served by the Housing Authority's trespass policy were substantial: the undisputed record showed that the primary goal was to "eradicate illegal drug activity in ... an 'open-air drug market'" in the housing complex.[29]

Rendering criminal trespass laws useless in protecting government property creates great danger to public safety. In a society where we see guns at schools and bombs and anthrax at courthouses, trespass laws are a major tool for law enforcement officials. These laws are not typically mere "keep off the grass" regulations enacted to make property maintenance easier. Invalidating them poses a much greater threat than does invalidating speech-restriction laws or expressive-conduct-restriction laws. It is not hard to appreciate the difference between the effect on public safety of invalidating a law barring outsiders from a housing complex invaded by an open-air drug market and the effect of invalidating a law requiring a permit to place newspaper racks on a public sidewalk.[30] In considering

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[28] *Broadrick*, 413 U.S. at 615; *Hill*, 530 U.S. at 731-32.

[29] *Hicks*, 563 S.E.2d at 676.

[30] Compare this case to *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988)(invalidating

whether to invalidate laws or policies, courts should give great weight to the benefits of the "plainly legitimate sweep" of trespass laws or other ordinary criminal laws.

The Housing Authority policies barring persons without a "legitimate business or social purpose for being on the premises"[31] are similar to policies for many government owned places. A typical example is the trespass policy for the United States Supreme Court Building. This Court's regulations give the Marshal of the Supreme Court nearly complete discretion to bar the general public from all or any portion of the Supreme Court Building or grounds, and to determine who is or is not a member of the "general public":

> In order to protect the Supreme Court Building and grounds, to protect the persons and property therein, or to maintain suitable order and decorum, the Marshal of the Supreme Court, pursuant to the responsibilities outlined in 40 U.S.C. § 13*l*, may, at any time, declare the Supreme Court Building and grounds, or any portion thereof, closed to the general public. Any person who, having been informed of the closure of the building or grounds or portion of the building or grounds, enters the closed area without the authorization of the Marshal or refuses to leave the closed area after being requested to do so shall be subject to arrest and

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ordinance requiring permits for placement of newspaper racks on public property, with permits issued at the discretion of the mayor).

[31] *Id.* at 676.

subject to penalties set forth in 40 U.S.C. § 13m.[32]

Appropriately, this regulation is no more definite than the Housing Authority regulation barring access to any person who is not a resident, is not an employee, or "cannot demonstrate a legitimate business or social purpose for being on the premises."[33] In fact, the Housing Authority regulation is even more definite in its phrasing than the Supreme Court's bar on the "general public" accessing certain areas. The regulation on its face contains no standards for the exercise of the Marshal's discretion that would prevent the Marshal from engaging in viewpoint discrimination in defining "general public" or in deciding who can access which areas.

And there is nothing wrong with that, except in the eyes of the Virginia Supreme Court. In that court's view, standardless discretion alone leads to an invalidation of a trespass-type policy. Under the Virginia court's decision, the Supreme Court Building trespass regulation would be invalid.

The implications of the Virginia Supreme Court's analysis would be staggering for the Supreme Court Building. A person planning terrorist activity might trespass onto restricted parts of the building to learn about the floor plans, access, and other details of the non-public portions of the building. If he is then arrested, the Virginia court's analysis would allow him to argue that the broad discretion given to the Marshal makes him immune from conviction. Moreover, an overbreadth

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[32] Regulation Two, approved October 4, 1994, provided to counsel Erwin O. Switzer by the Supreme Court of the United States Police via facsimile on February 14, 2003.

[33] *Hicks*, 563 S.E.2d at 676.

ruling would leave this Court entirely without trespass regulations, at least until it could come up with something that meets the Virginia court's standard.

We do not use this example to criticize this Court's policies in any way. The point is the opposite. This Court's security policies are appropriate and reasonable; the Virginia Supreme Court's analysis and its necessary results are not. The nation would be severely endangered if the trespass policies of the Supreme Court Building were easily invalidated. Depriving the residents of a single housing development of the protection of trespass policies would not have the same broad impact. But those people also deserve protection.

We cannot quantify the scope of the problem that affirming the Virginia court's holding would create. Formal policies like this Court's Regulation Two are not catalogued. But they certainly exist in a variety of other contexts, protecting those who use government property. Three generic examples are libraries, elementary and secondary schools, and colleges.

Public Libraries: Libraries pride themselves on providing opportunities for children and adults to study and learn in a quiet, safe environment. To achieve those goals, libraries will revoke library privileges and ban persons who disrupt those activities, whether by fighting, stealing, drug-activity, or other inappropriate or offensive behavior. The trespass laws are used to keep such persons out if they try to return.

Consider the case of a young adult who seeks out an enemy gang member at a library and begins an assault. The library revokes the assailant's privileges. The assailant returns and is arrested for trespassing. Under the Virginia Supreme Court analysis, the assailant could avoid a conviction if the library used general terms (such as "inappropriate behavior") or

if the branch manager thought she had wide discretion to decide whose privileges to revoke. This would be the case even though there had never been a revocation on unconstitutional grounds, or perhaps not even a revocation at all. Moreover, not only would the assailant be free to return, but the library would be unable to exclude anyone from the library whose privileges were revoked.

Elementary and high schools: Schools face many potential dangers from outsiders. Drug dealers or pedophiles may lurk near or on school grounds. Children may be subjected to kidnaping from bitter, non-custodial parents. Students expelled or suspended for bringing weapons to school may want to re-enter school property to settle a score. But schools also benefit from the presence of outsiders. Schools readily invite many, including include police officers, judges, and artists, to speak to classes or assemblies or otherwise interact with students. And they invite parents and other volunteers, whose contributions are often critical to the schools' success.

The policies of many schools contain general descriptions of who is authorized to be on the school premises. Given the wide variety of possible non-students and non-employees who may visit a school, it is quite reasonable to use a phrase like "legitimate business or social purpose" to describe who may enter school property. But according to the Virginia Supreme Court, if a school uses such a description to describe the classes of persons who are not deemed trespassers, the trespassers could go unpunished, and the school would find itself unable to enforce the trespass policy at all.

College campuses: While state-run college campuses often make portions of their properties available to the public, there are many portions of the campus that are restricted to varying degrees. These include laboratories, dormitories, and administrative offices.

The Virginia Supreme Court's holding would be particularly problematic on college campuses. For instance, a policy that barred from a women's dormitory non-residents and persons without a legitimate social or business purpose for being there would seem to be invalid under the Virginia court's test. This would be particularly likely if the policy did not expressly preclude the possibility of viewpoint discrimination, such as permitting the lobby to be used for pep rallies to support the football team but not for demonstrations to discontinue the football program. If there is a constitutional problem with that distinction, the problem should not provide a defense to a trespasser who is stalking a resident. And that perceived defect should not be a basis for invalidating the trespass policies altogether, making it impossible to arrest anyone in the dormitory for trespassing. Facial invalidation is an unwarranted remedy.

It is particularly ironic that the Virginia decision would reduce the protection granted by trespass laws to those present on college campuses. "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas'...." *Healy v. James*, 408 U.S. 169, 180-81 (1972), *citing Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 249-250 (1957) (Warren, C.J., plurality opinion), 262 (Frankfurter, J., concurring in result). But it will not remain an effective marketplace if trespass laws are eliminated as a method of protecting the safety of those who live and speak on campus. Indeed this Court has recognized that first amendment rights on campus are for "persons entitled to be there," *Widmar v. Vincent*, 454 U.S. 263, 269 (1981), a statement that necessarily implies that others may be excluded. Again, trespass laws and policies are an essential tool in that exclusion.

The threat posed by interlopers seems obvious – and not just in libraries, in schools, on college campuses, and in courthouses. Without being graphic, it is easy to imagine real and substantial harm that would occur if government trespass policies were broadly invalidated, as the Virginia Supreme Court's rule would require. The infestation of drugs and other crimes in the Housing Authority development is obviously of great import. When balancing the threat of chilling against the public safety concerns as advanced by ordinary criminal laws that only incidentally affect speech, the public safety concern will typically, if not always, outweigh the concern with chilling.

Indeed, our research revealed no pre-*Hicks* cases in which such significant safety concerns were outweighed by the interests of combating a chilling. In the rare case invalidating laws pursuant to the overbreadth doctrine, the safety concerns served by the law at issue are typically less significant than are those served by ordinary criminal laws. For example, this Court has invalidated laws under the overbreadth doctrine only a few times in the last thirty years. And in each instance, the statute at issue had obvious free speech implications, regulating such things as the placement of newspaper racks on public

sidewalks,[34] parade permits,[35] or the use of foul language.[36] None of those laws implicated serious public safety concerns.

The Virginia Supreme Court's analysis, if adopted by this Court, would threaten public safety interests in many contexts. This Court should not allow the overbreadth doctrine to be expanded to undercut trespass or other ordinary criminal laws.

IV. Those who will suffer most from the invalidation of trespass laws or other public safety laws, persons who are among the most vulnerable in our society, should not be burdened with more crime.

Under the Virginia Supreme Court's standards, law enforcement tools would be at their weakest where the public most likely would assume that the vigilance to protect public safety is greatest. The persons most affected will be those who live in government-owned public housing. Persons who can

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[34] *City of Lakewood*, 486 U.S. 750 (1988)(invalidating ordinance requiring permits for placement of newspaper racks on public property, with permits issued at the discretion of the mayor).

[35] *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992)(invalidating parade permit ordinance in which the permit fee could be varied in the discretion of the government permitting official).

[36] *Gooding v. Wilson*, 405 U.S. 518, 518, 527 (1972)(invalidating ordinance against use of "opprobrious words or abusive language .... tending to cause a breach of the peace," construed to bar any "words offensive to some who hear them").

afford to live on private property – in luxury condominiums or apartment complexes – lose not trespass protection.

If this Court approves of the low threshold set by the Virginia Supreme Court, more and more trespass policies will be invalidated. And more and more criminal trespassers will go free. The drug-dealer at the public housing complex who seeks to ensnare new victims cannot be tossed out or arrested unless caught in the act. The plotting burglar can case a residence with impunity. The potential assailant can sit and wait indefinitely for a former girlfriend to emerge from her residence.

The Virginia Supreme Court's concern with freedom of speech does not justify the adverse impacts of its holding. Those who live in an "open-air drug market" will find little solace in a court's efforts to protect them the "possible inhibitory effects" on the airing of grievances left to fester.[37] Particularly when the societal benefit of judicial repeal of policies is marginal, the courts should not leave the poorest and most vulnerable members of society to shoulder another burden.

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[37] *Broadrick*, 413 U.S. at 612.

CONCLUSION

The First Amendment overbreadth doctrine should not be expanded. Before allowing a defendant to invoke the rights of non-litigants, courts should give great weight to the legitimate public interests at stake. Failure to do so imposes unnecessary risks on the poor in public housing and other persons who live, work, or visit government property.

Respectfully submitted,

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